

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Residential  
Building Contractor License of Pender  
Poured Walls, Inc., License No.  
20060514

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on before the undersigned Administrative Law Judge on October 7, 1999 for a prehearing conference. The prehearing conference was held pursuant to a Notice of and Order for Hearing and Notice of Prehearing Conference dated June 14, 1999, and an amended Notice of and Order for Hearing and Notice of Prehearing Conference dated August 26, 1999.

Sarah Walter, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared on behalf of the Minnesota Department of Commerce. The Respondent, Pender Poured Walls, Inc. was not represented at the prehearing conference. The record closed upon the Respondent's default on October 7, 1999.

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least ten (10) days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Gary A. Lavasseur, Deputy Commissioner, Enforcement Division, Minnesota Department of Commerce, 133 East Seventh Street, St. Paul, MN 55101, telephone (651) 296-2594 to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

**STATEMENT OF ISSUE**

The Commissioner of Commerce may, by order, deny, suspend, or revoke any license issued by the Department of Commerce, censure a licensee, and/or impose a civil penalty upon a licensee for illegal acts. Respondent failed to pay a concrete supplier for constructing a foundation on a homeowner's house from proceeds paid to Respondent by the homeowner for that purpose. As a result of his violation, should the Commissioner take adverse action against the Respondent's license?

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. On September 2, 1999, a copy of the Amended Notice of and Order for Hearing and Notice of Prehearing Conference was mailed to Steven M. Minn, Commissioner, Minnesota Department of Commerce, 133 East Seventh Street, St. Paul, MN 55101 (Certified Mail No. 17224) and to Pender Poured Walls, Inc., c/o Christopher Pendergrass, 23540 Magnesium Street N.W., St. Francis, MN 55070, as appears from an Affidavit of Mailing on file herein.

2. The Respondent Pender Poured Walls, Inc. did not appear at the prehearing conference and Christopher Pendergrass was not present. Respondent did not obtain the ALJ's prior approval to be absent from the prehearing conference, it did not file a Notice of Appearance, and it did not request a continuance or any other relief.

3. The Amended Notice of and Order for Hearing and Notice of Prehearing Conference contained the following informational warning:

**If Respondent fails to attend or otherwise appear at any prehearing conference, settlement conference, or the hearing in this matter, or fails to comply with any interlocutory order of the judge after having been served with a copy of this Order, Respondent shall be deemed in default and the allegations or issues set forth herein may be deemed proved, and Respondent's residential building contractor license may be revoked or suspended, Respondent may be censured, and/or a civil penalty may be imposed against Respondent without further proceedings.**

4. The hearing notice also contained the following instruction:

**A PARTY INTENDING TO APPEAR AT THE PREHEARING CONFERENCE MUST FILE THE ENCLOSED NOTICE OF APPEARANCE WITH THE ABOVE-NAMED ADMINISTRATIVE LAW JUDGE WITHIN TWENTY (20) DAYS OF THE DATE OF SERVICE OF THIS ORDER. A COPY OF THE NOTICE OF APPEARANCE MUST ALSO BE SERVED WITHIN TWENTY (20) DAYS OF THE DATE OF SERVICE OF THIS ORDER UPON ASSISTANT ATTORNEY GENERAL SARAH WALTER, 1200 NCL TOWER, 445 MINNESOTA STREET, ST. PAUL, MN 55101-2130.**

5. The allegations in the hearing notice are true and are set forth herein as Findings 6 through 14.

6. Pender Poured Walls, Inc., (hereinafter "PPW") held residential builder contractor license no. 20060514. The license was issued on April 18, 1996. It expired on March 31, 1997. It was renewed on July 22, 1997, and was active until April 31, 1999, when it expired. It is currently inactive.

7. Christopher Pendergrass is the qualifying person and proprietor of Respondent PPW.

8. On May 6, 1999, the Department of Commerce ("Department") received a complaint from homeowners Tom and Mary Gallagher. Their complaint involved PPW, which they had hired as a foundation contractor.

9. On July 13, 1998, the Gallaghers received an invoice from PPW for \$10,784.00. On July 21, 1998, they paid PPW in full and received a mechanic's lien waiver from PPW.

10. On February 23, 1999, the Gallaghers received a letter, following a telephone call, from Paragon Financial Services. Paragon sought to collect \$1,500.00 from the Gallaghers for AME Group, a concrete supplier. PPW had used AME concrete in constructing the Gallaghers foundation, but it failed to pay AME from the proceeds of the Gallaghers' payment to PPW.

11. On May 10, 1999, the Department sent a letter to PPW asking for information regarding this situation. To date, no information has been received.

12. PPW failed to pay AME for concrete used in the construction of the Gallaghers' foundation from proceeds of the Gallaghers' payment made to PPW.

13. The Gallaghers' payment to PPW was intended, as agreed by the parties, to cover all costs, including materials, associated with the construction of their foundation.

14. The agreement between the Gallaghers and PPW was that PPW would pay its supplier from proceeds of their payment.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Commerce are authorized to consider the charges against Respondent under Minn. Stat. §§ 326.91, 45.027, subd. 1, 45.024, and 14.50 (1998).

2. Respondent received due, proper and timely notice of the charges against him and of the time and place of the prehearing conference and this matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant substantive and procedural legal requirements.

4. Under Minn. R. 1400.6000, a contested case may be decided adversely to a party who defaults. On default, the allegations of and the issues set out in that Notice of and Order for Hearing or other pleading may be taken as true or deemed proved without further evidence.

5. The Respondent is in default herein as a result of his failure, without the ALJ's prior consent, to appear at the prehearing conference.

6. Respondent's failure to pay AME for concrete used in the construction of the Gallaghers' foundation with proceeds given to PPW by them constitutes a violation of Minn. Stat. § 326.91, subd. 1(8) (1998), and subjects PPW to discipline and/or civil penalties pursuant to Minn. Stat. § 326.91, subd. 1 and 45.027, subds. 6 and 7 (1998).

7. PPW's failure to pay AME from proceeds of payment received from the Gallaghers demonstrates incompetent, untrustworthy, or financially irresponsible behavior constituting a violation of Minn. Stat. § 326.91, subd. 1(6) (1998) and, subjects PPW to discipline and/or civil penalties pursuant to Minn. Stat. §§ 326.91, subd. 1 and 45.027, subds. 6 and 7 (1998).

8. PPW's failure to use the proceeds of the Gallagher's payment to pay AME for supplies used in construction constitutes a fraudulent, deceptive, and dishonest practice violating Minn. Stat. § 326.91, subd. 1(2) (1998), and subjects the Respondent to discipline and/or civil penalties pursuant to Minn. Stat. §§ 326.91, subd. 1 and 45.027, subds. 6 and 7 (1998).

9. Disciplinary action against the Respondent is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED: that the Commissioner of the Minnesota Department of Commerce take adverse action against the Respondent's license, censure Respondent, and/or impose a civil penalty upon him.

Dated this 12<sup>th</sup> day of October, 1999

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JON L. LUNDE  
Administrative Law Judge

Reported: Default (no tapes)

#### **NOTICE**

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.